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September  
1997

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State Water Resources Control Board  
Division of Clean Water Programs

**UNDERGROUND STORAGE TANK CLEANUP FUND**

# ANNUAL REPORT

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State Water Resources Control Board

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## PREFACE

*Pursuant to Chapter 6.75, Article 9, Section 25299.81(d) of the Health and Safety Code (H&SC), the State Water Resources Control Board (SWRCB) is mandated to prepare an annual report to the Legislature describing the status of the Underground Storage Tank Cleanup Fund (Fund). This annual report discusses recent legislative changes to the Fund for improving the efficiency of the program, with special emphasis on expediting environmental cleanup and the distribution of monies from the Fund*

*Although Assembly Bill 116 (Chapter 870, Statutes of 1996) established a moratorium on the preparation and submission of this annual report until October 1, 1999, the SWRCB has prepared this annual report as a continuing effort to provide quality customer service to our claimants, local regulatory agencies, and other public members serviced by the Fund.*

*Dave Deaner, Manager  
UST Cleanup Fund*

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## EXECUTIVE SUMMARY

The Underground Storage Tank Cleanup Fund (Fund) was created by California's Legislature and the program established in February 1991. The purpose of the Fund is to achieve two goals; first, to provide affordable environmental impairment insurance to eligible underground storage tank (UST) owners and operators enabling them to meet federal and state financial responsibility requirements; and second, to provide financial assistance for eligible cleanup costs and damages awarded to third parties injured by petroleum releases. On June 9, 1993, the United States Environmental Protection Agency (EPA) approved California's Fund as a mechanism for meeting the federal financial responsibility requirements for USTs containing petroleum.

The Fund benefits a large number of small businesses and individuals by providing reimbursement for unexpected and catastrophic expenses associated with the cleanup of leaking petroleum tanks.

Many applicants have spent their working lives building a small business, only to find that when they wish to retire they are unable to sell the business and/or property because it contains old gas tanks that have leaked. To their further dismay, they must spend thousands of dollars from their life savings to clean up the now worthless piece of property. This is a common scenario facing claimants applying to the Fund. The Fund represents the only form of financial relief for people whose livelihood depends on their ability to produce an income from their business.

In addition to reimbursing claimants for corrective action costs, the Fund provides money to the Regional Water Quality Control Boards and local regulatory agencies to abate emergency situations or clean up sites which are posing a threat to human health, safety, and the environment. As an example, emergency funding was provided on two separate occasions to abate an explosion hazard when vapors entered buildings through the sewer system.

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## ***Program Effectiveness***

The best measures of effectiveness for the Fund are the number of claimants served and the number of claims paid. As of August 31, 1997:

- The Fund had issued 4,744 Letters of Commitment (LOCs) in the amount of \$493 million
- \$132 million was appropriated for Fiscal Year 1996-97 for the award of new or increases to existing LOCs.
- The Fund had received 12,591 reimbursement applications.
- 217 "A" claimants, 2,744 "B" claimants, 1,468 "C" claimants, and 315 "D" claimants had received LOCs.
- The Fund had paid 10,359 reimbursement requests for a total of \$388 million.
- The Fund had processed over 2,474 corrective action cost pre-approvals.
- Funds for 26 sites had been approved for direct cleanup by the regulatory agencies through the Emergency, Abandoned, Recalcitrant (EAR) Account with \$1,125,000 expended.
- 260 claims to the Circle K Settlement Trust Fund have been processed with approximately \$1,296,018 million expended.

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## ***Program Improvements***

1. The time that it takes to review the claim application, make a determination of eligibility, and recommend the claim for placement on the priority list has been reduced on average to less than 60 calendar days.
2. The Fund has been able to issue LOCs to most claimants in Priority Classes A, B, and C, and anticipates funding about 500 Priority D claims by June 30, 1998. Funding for fiscal year 1998-99 should be adequate for the Fund to process all claims in Priority Class A, B, and C as their are received, and to continue to activate a number of Priority D claims.
3. The Fund is now able to pre-approve costs on most claims. This pre-approval process allows responsible parties to come to an understanding with regards to eligible reimbursable costs prior to incurring the costs. The Fund staff are working together with the regulatory agencies and the responsible parties to resolve any differences so reimbursement of eligible costs can reasonably be assured.
4. The Fund has improved the time for the processing of payments from an average in-house time of 70 days in 1993 to 35 days in 1997. The pre-approval of costs, along with a streamlined review process, have contributed to the improved processing time.

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## THE PROGRAM

Federal and state laws require UST owners and operators to maintain financial responsibility for any damages arising from their tank operations. The Barry Keene Underground Storage Tank Cleanup Fund Act of 1989 (Act) was created by the California Legislature because of the inability of UST owners and operators to obtain insurance for their tanks and to pay for cleanup when a leak was discovered. The Fund is administered by the California State Water Resources Control Board (SWRCB).

The Fund was established to administer the Act in February of 1991 and regulations became effective on December 2, 1991. That same month, more than 10,000 applications were mailed to potential claimants and by January 17, 1992, over 6,000 claims were received. A preliminary review of these claims was completed by April 16, 1992, and claimants were notified of their standing. The first priority list was adopted on July 16, 1992 and contained 3,583 approved claims.

## FINANCIAL RESPONSIBILITY

Federal EPA regulations (40CFR, section 2980.90, subpart H, Financial Responsibility) published on October 26, 1988, requires owners and operators of USTs to demonstrate through insurance coverage or other acceptable mechanisms that they can pay for cleanup and third party damages resulting from leaks that may occur from their petroleum USTs.

On June 9, 1993, the United States Environmental Protection Agency (EPA) approved California's Fund as a mechanism for meeting the federal financial responsibility requirements for USTs containing petroleum.

As an alternate to the mechanisms authorized in the Federal Act, the SWRCB approved two additional mechanisms that can be used in conjunction with the Fund. The Letter from Chief Financial Officer is one alternate that requires that the UST owner or operator demonstrate a tangible net worth of ten times the required minimum applicable annual aggregate coverage as required.

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The other alternate mechanism is a Certificate of Deposit which the UST owner or operator secures at their banking institution. The Certificate of Deposit is made payable to the SWRCB for the required minimum applicable annual aggregate coverage.

To more fully answer questions regarding financial responsibility, the Fund has published and made available to the public the "Petroleum Underground Storage Tank Financial Responsibility Guide".

## FUNDING

Established by Senate Bill 299 in 1989, modified by Senate Bill 2004 in 1990 and other subsequent legislation, the Fund requires every owner of a petroleum UST which is subject to regulation under California's Health and Safety Code (H&SC) to pay a per gallon storage fee to the Fund.

This fee began on January 1, 1991 at six mills (\$0.006) per gallon. Implementation of Senate Bill 1764, signed by Governor Wilson on September 30, 1994, increased this fee to seven mills (\$0.007) per gallon effective January 1, 1995, to nine mills (\$0.009) on January 1, 1996, and to the current twelve mills (\$0.012) on January 1, 1997. The fee collection is scheduled to end on January 1, 2005, and the Fund will then begin to wind down as the funds are depleted.

## ELIGIBILITY REQUIREMENTS

To be eligible to file a claim with the Fund, the claimant must be a current or past owner or operator of the UST from which an unauthorized release of petroleum has occurred, and be required to undertake corrective action by the regulatory agency. Other eligibility conditions include compliance with applicable state UST permitting requirements and regulatory agency cleanup orders. In addition to USTs subject to state regulations, owners of small home heating oil tanks which have an unauthorized release of petroleum are also eligible.

The maximum reimbursement per occurrence is \$1 million, less the applicable deductible. The deductible varies from \$0 to \$20,000 depending



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upon the claimant's priority classification and compliance with the UST permitting requirements.

## CLAIM PRIORITY SYSTEM

Because claims with the Fund will exceed available funding for a number of years, the Fund's implementing legislation provided for a priority system to first reimburse those claimants who are least able to pay the costs of corrective action.

The highest priority, Class A, is assigned to residential UST owners; the second priority, Class B, is assigned to UST owners and operators of small businesses; the third priority, Class C, is assigned to UST owners and operators of larger businesses with fewer than 500 employees; and the fourth priority, Class D, is assigned to all other UST owners or operators.

Placement on the priority list is based on the approved priority class and the date a completed claim is received by the Fund. If more than one claim is received on the same date, they are randomly ranked. Claims on the priority list will generally be processed according to priority class and the claim's rank on the list.

At least once a year, the priority list is published and includes newly approved claims. Prior claims on the priority list retain their relative ranking within their priority class with new claims ranked in their appropriate priority below those carried over from the previous list. New claims in a higher priority are processed before older claims in a lower priority.

## CLAIMS PROCESSING

The Fund's claim forms request information that is necessary to make a determination of eligibility for reimbursement of cleanup costs. Claims are reviewed for completeness, eligibility, and in conjunction with the regulatory agency to ensure that the cleanup is in compliance with chapter 6.7 of the

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H&SC, applicable federal regulations, and any orders and directives issued by the SWRCB, Regional Water Quality Control Board, and the local regulatory agency.

When a claim is determined to be eligible for funding, it will be placed on the priority list in the appropriate priority class by the date the completed claim was received by the Fund. If the claim is determined to be ineligible, the reasons for this determination will be mailed to the claimant, along with information on the claimant's appeal rights.

The claim application package was revised in October of 1997, and now contains more detailed instructions along with the additionally required forms that the claimant can tear out when completing the claim.

## LETTERS OF COMMITMENT

When a claim is activated from the priority list, the eligibility requirements are verified with the appropriate regulatory agency, and a Letter of Commitment (LOC) is issued. The LOC is the mechanism that the Fund uses to award or encumber funds for reimbursement of cleanup costs.

When a claimant is issued an LOC, their claim is removed from the priority list. LOCs are initially issued in an amount adequate to cover the actual eligible costs incurred to date plus additional "seed" money to allow the cleanup to proceed on schedule. As the cleanup advances, the LOC is amended to cover more of the costs. As of August 31, 1997, the Fund had issued 4,744 LOCs in the amount of \$493 million.

\$132 million was appropriated for Fiscal Year 1996-97 for the award of LOCs. With the large number of active LOCs, a substantial part of the annual appropriation must be used to amend (increase) existing LOCs. The Fund estimates that as much as \$80 to \$100 million must be set aside for amendments to ensure that funding is available to provide reimbursements.

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## REIMBURSABLE COSTS

Eligible owners and operators of USTs may submit claims for reimbursement of the cleanup costs incurred for work performed on or after January 1, 1988, and for the reimbursement of amounts awarded in third party compensation claims.

Only reasonable and necessary corrective action costs will be reimbursed, and only one claim may be submitted per cost. A claimant may not claim costs paid by or on behalf of others.

Claimants are not entitled to double payment on account of any corrective action or third party compensation costs. Claimants are required to identify, under penalty of perjury, all funds received that relate to or are paid in consideration of the UST release that is the subject of the claim from any source including insurance claims, legal judgments, contributions from other potentially responsible parties, or any other source, regardless of how the funds are characterized. If a claimant receives reimbursement from the Fund and also receives compensation from another source, the claimant must repay the Fund.

## DEDUCTIBLE

All claimants are subject to a deductible. The deductible amount is determined by the claimant's priority class. When the claimant failed to obtain required permits and a request for a waiver of the permit requirement has been granted, the deductible is double the amount otherwise applicable.

<i><b>Priority Class</b></i>	<i><b>Deductible</b></i>	<i><b>Deductible with Permit Waiver</b></i>
Class A	\$ -0-	\$ -0-
Class B	\$ 5,000	\$ 10,000
Class C	\$ 5,000	\$ 10,000
Class D	\$ 10,000	\$ 20,000

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## THIRD PARTY COSTS

Third party compensation claims are the result of a court-approved settlement, a final judgment (other than a default judgment), or an arbitration award by a court-appointed arbitrator. These are a result of proceedings in accordance with the California Code of Civil Procedure commencing with section 1280, imposing liability upon an owner or operator for bodily injury or property damage to a third party as a result of an unauthorized release of petroleum from a UST.

Third parties do not include owners of the real property from which the release occurred, owners and operators of the USTs that are the subject of the claim, or tenants and landlords of the sites.

In order to file a claim for third party compensation costs, UST owners and operators must be eligible to file a claim for cleanup costs for the site involved, and the judgment, arbitration award, or settlement must have been entered or approved after January 1, 1988.

## THREE BID REQUIREMENT

The law establishing the Fund requires claimants who contract for corrective action work to obtain at least three bids or proposals with the exception of the following:

1. Work already under written contract as of December 2, 1991, including continuation of work underway if covered by such a contract;
2. The first \$10,000 of eligible corrective action costs excluding tank removal, upgrade or replacement; and
3. Corrective action work conducted by a local agency force account on their own site(s).

Although corrective action is defined in four phases (see article 11, chapter 16, of the Underground Storage Tank Regulations), the Fund

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recognizes that for practical purposes there are two distinct efforts; namely, contamination investigation and contamination cleanup. At a minimum, the claimant must receive three bids or proposals on the investigation effort (Phases I and II) and three bids or proposals on the contamination cleanup (Phases III and IV).

Claimants must follow applicable state laws and regulations in procuring qualified consultant and contractor services, and must ensure that such services are obtained from qualified firms at a reasonable price. Claimants have the ultimate responsibility in selecting whom they wish to hire.

## PRE-APPROVAL

Pre-approval is a method by which the claimant can come to an understanding with the Fund with regards to eligible reimbursable costs prior to starting the cleanup. If the proposed project activities are completed as presented for those cost pre-approved and an LOC has been issued, then reimbursement is virtually assured.

Pre-approval is not prepayment nor is it an exemption from any required documentation or bid requirement.

The claimant should monitor all work that is conducted to ensure compliance with the bid or proposal and submit detailed invoices for reimbursement. If the costs requested by the claimant in the reimbursement request exceed the pre-approval amount, justification must be provided. The Fund will review the request to ensure compliance with the corrective action activities, and will reimburse those costs determined reasonable and justified.

## FUND SUBACCOUNTS

Section 25299.50 of the H&SC provides the SWRCB the statutory authority to modify or create accounts in the Fund that are determined by the SWRCB to be appropriate or necessary for proper administration of the Fund. Two accounts have been created under this authority: (1) The Emergency,

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Abandoned, Recalcitrant (EAR) Account; and (2) The Circle K Settlement Trust Fund Account.

### ***EAR Account***

The Emergency, Abandoned, Recalcitrant (EAR) Account was established in 1991 to provide funding to the Regional Water Quality Control Boards (RWQCB) and local agencies to undertake or contract for corrective action at UST sites. The EAR Account, authorized by sections 25299.36 and 25299.37(f) of the H&SC, may be used to take corrective action at petroleum UST sites that have had an unauthorized release and require either: (1) immediate prompt action to protect human health, safety and the environment (emergency or prompt action sites); or (2) where a responsible party cannot be identified or located (abandoned sites); or (3) the responsible party is either unable or unwilling to take the required corrective action (recalcitrant sites). All costs incurred are subject to cost recovery from the responsible party.

The Fund manages the EAR Account which is funded by an annual Budget Act appropriation of \$5 million from the petroleum UST Cleanup Fund.

### ***Circle K Settlement Trust Fund***

Through bankruptcy proceedings Circle K Corporation has abandoned numerous petroleum UST sites in California. The California Circle K Settlement Trust Fund was created based on the authority granted by a July 26 1993 court-approved settlement agreement that was executed between the SWRCB and Circle K Corporation, and section 25299.50 of article 6, division 20, chapter 6.75 of the H&SC. California was awarded approximately \$43.9 million to be provided in annual payments over a seven year period. The payments are to be used to pay for tank removal and preliminary site assessment costs up to \$15,000, and a portion of corrective action costs (22%) up to \$200,000 per designated site. Eligible claimants can recover the remaining portion of eligible corrective action costs from the Fund.

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### ***Commingled Plume Account***

The Commingled Plume Account was created by Senate Bill 562 (Chapter 611, Statutes of 1996) to encourage responsible parties with commingled plumes to coordinate their cleanup efforts, avoid litigation, more rapidly address required cleanups, and significantly reduce the costs of cleanup.

A commingled plume is defined as the condition that exists when groundwater contaminated with petroleum from two or more discrete unauthorized releases have mixed or encroached upon one another to the extent that the corrective action performed on one plume will necessarily affect the other. A commingled plume does not include contaminated groundwater plumes resulting from unauthorized releases or discharges from a single site, or soil contamination, unless it can be demonstrated that the contaminated soil is an immediate threat to groundwater.

Commingled plume sites represent a special problem to California's groundwater protection efforts because they often represent more serious water quality impacts, involve parties that disagree as to liability, and include cleanups which continue to be stalled or handled in a piecemeal, haphazard expensive manner. Unless corrective action is performed in a coordinated manner, corrective action of commingled plumes could be ineffective.

## **RUST LOAN PROGRAM**

Chapter 8.5 (commencing with section 15399.10) division 3, title 2, of the California Government Code created a loan program to be administered by the California Trade and Commerce Agency. The loan program assists small businesses in upgrading, replacing, or removing tanks to meet applicable local, state and federal standards.

Each fiscal year, funds are appropriated from the Underground Storage Tank Cleanup Fund for this loan program, known as the Repair/Replace Underground Storage Tank (RUST) Loan Program.

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RUST is designed to assist small businesses in adhering to new tank regulations. The loan can be used to repair, remove or replace USTs to meet the regulatory requirements.

The terms are a low fixed interest rate, guided by the State Surplus Money Investment Fund (SMIF) currently at 5 percent, with a 2 percent loan fee, and a 10 to 20 year repayment term. The loans range from \$10,000 as a minimum to \$750,000 as a maximum with eligible project costs 100 percent financed.

RUST loan application volume continues to increase as owners and operators of singled walled USTs are approaching the December 1998 deadline to bring their tanks into compliance with federal and state law.



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## FISCAL STATUS REPORT

### CASH BALANCE (September 30, 1997)

#### ***Funds Received:***

- Mill Storage Fee Collected	\$668,483,698
- Net from Previous Fees	\$8,591,052
- Net Interest Earned	\$40,281,886
Total Funds Received:	\$717,356,636

#### ***Funds Expended & Committed:***

- Program Administration	\$35,710,455
- Local Oversight Program	\$37,900,049
- Trade & Commerce Loan Program	\$42,400,000
- Board of Equalization	\$7,166,000
- Claims Reimbursement	\$511,730,061
Total Funds Expended & Committed:	\$635,006,565

Available Balance:	\$82,350,071
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## LEGISLATION

### ***Enacted***

Governor Wilson signed Assembly Bill 592 (Kuehl, Chapter 814 of Statutes 1997) on October 6, 1997. This new law, among other things, allows the SWRCB to spend up to \$5 million from an account within the Fund to reimburse public drinking water systems for treating, or providing an alternate source of drinking water contaminated by an oxygenate that leaked from a UST.

The Fund is currently working on the implementation of this legislation. Guidelines and procedures have been sent out to those agencies eligible to participant in this program.

### ***Proposed***

The SWRCB intends to sponsor legislation this coming year to:

1. Clarify that the Fund is a state entity entitled to assert sovereign immunity from suit in federal court;
2. Define the term “regulatory technical assistance” and limit claims for regulatory technical assistance;
3. Clarify that claimants are not entitled to reimbursement for costs that the claimant has been, or will be, compensated for by another party other than the Fund;
4. Revise provisions of the law that currently govern Fund appeals, petitions for review, and proceedings conducted by the SWRCB; and
5. Make a number of technical revisions so that the Fund can operate more efficiently and effectively, and to reduce the potential for appeals and litigation created by ambiguous language.

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## SIGNIFICANT ISSUES

The most significant problem contributing to limiting or delaying the number of new LOCs issued in any given year is the difficulty in making accurate projections of funds required to increase existing LOCs. When funding is committed to a claim, funds are only committed to cover the cleanup work already completed plus some “seed” money to keep the cleanup progressing. As the cleanup progresses and the reimbursement requests are submitted, LOCs are amended to increase the funding level and to avoid delaying payments. The highest priority for funding each fiscal year is to ensure there are funds available for the active LOCs where corrective action work is proceeding.

At the start of each fiscal year, the Fund must estimate and set aside sufficient funding for anticipated LOC increases. This estimate is affected by the number of active LOCs issued, the status of the cleanup on these LOCs, cleanup standards being enforced by the regulatory agencies, and the anticipated costs of corrective action being undertaken during the year.

For example, during Fiscal Year 1995-96, the Fund set aside \$50 million for increases and made the balance of the appropriation available for issuing new LOCs. By January 1996, it was obvious that much more than the \$50 million would be needed for amendments and the issuance of new LOCs had to be substantially curtailed. The Fund ended up using over \$82 million for amendments for that fiscal year.

With more LOCs having been issued, the Fund set aside \$100 million in Fiscal Year 1996-97 for amendments. At the end of the fiscal year, amendments used only \$62.4 million. This meant that there was an additional \$37.6 million available for issuing new LOCs. These LOCs could have been issued earlier if it was possible to make accurate projections of the funding needed for amendments.

To ensure that the additional funding is committed to claims on the priority list as soon as possible, the Fund tries to have a number of claims processed and “on the shelf” in the event unanticipated funding becomes available.

For Fiscal Year 1997-98, the Fund has set aside approximately \$122 million for issuing new LOCs and \$100 million for amendments.